IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH JAIPUR

J U D G M E N T

Kapil Dev and others V/S Union of India & others

S.B. Civil Regular First Appeal No. 146/84 against the judgment and decree dated 9.4.1989 passed by Shri Anoop Chand Goyal, Addl. District Judge No.2, Jaipur City, Jaipur in Civil Suit No. 20/1978.

Date of Judgment ::: August 17, **2006**

PRESENT

HON'BLE MR. JUSTICE KHEM CHAND SHARMA

Mr. Ram Singh for the appellants
None for the respondents

BY THE COURT:

This appeal under Section 96 CPC arises out of the judgment and decree dated 9.4.1984 passed by the learned Additional District Judge No.2, Jaipur City, Jaipur whereby the learned Judge has dismissed the plaintiffs' suit.

The plaintiff-appellants filed a suit for recovery of an amount of Rs. 31286 as damages on account of loss due to fire broken out in the Railway Wagon which resulted in damage of two consignments consisting of

900 bundles of safety matches. It was averred that on 26.2.1974 M/s Pandyan Match Industries Shivkasi had despatched two consignments consisting of 700 bundles and 200 bundles of safety matches for being delivered to the consignee, plaintiff No.1 at Jaipur. As per the averments of the plaint the consignments when tendered for booking at Shivkasi Railway station were in sound condition, fulfilling and complying with the railway packing conditions prescribed in this behalf and the consignments were booked at the risk of railway administration. The plaintiffs alleged it was only on account of gross negligence on the part of railway administration that the consignments were not offered to delivery to the consignee at Jaipur in the original condition and the same were found in badly damaged, devalued and spoiled condition and the contents were found broken on account of fire broken out in the wagon at Talvandiya. As such open delivery of the said consignments was given to the consignee at Khandwa railway station. A certificate was also issued by the Commercial inspector at Khandwa certifying the damaged/burnt condition of the consignments.

In the circumstances aforesaid, the consignee

plaintiff No.1 submitted a claim of Rs. 30,347.94 to the defendants, but of no avail. It may be stated that the goods under consignments was insured with the plaintiff No. 2 and as such the plaintiff No.2 having settled the claim of plaintiff No.1, paid a sum of Rs. 24,066 in terms of the insurance police. The plaintiff No.1 executed a letter of subrogation and power of attorney in favour of plaintiff No.2 for recovery of the aforesaid amount of loss along with interest from the defendants.

The plaintiffs thereafter served a legal notice upon the defendants asking them for payment of aforesaid sum along with interest @ 12%, totaling to Rs. 31,286/-. Since the defendants did not pay any heed to the notice, the plaintiffs had no option but to file the suit claiming damages on account of loss sustained by them as a result of negligence on the part of railway administration.

The defendants contested the suit by filing written statement and denied the allegations made in the plaint. The defendants have emphatically denied the allegation of negligence on their part. It was pleaded that there was no negligence or misconduct on the part

of railway administration or its servants. It was pleaded that damage to the consignments was caused only due to accidental fire and that the railway administration is not responsible for the said loss. It was further pleaded that railway administration took all possible care and caution in dealing with the suit consignments. The Inquiry committee consisting of three members have also inquired into the matter and after thorough probe, the committee has observed that every possible and responsible efforts were made by the Railway administration to extinguish fire when it was noticed.

On the basis of pleadings of the parties, the trial court framed issues and at the conclusion of trial dismissed the plaintiffs' suit, holding that it was an accidental fire and the railway administration was not at all responsible for the loss caused to the consignments.

I have heard learned counsel for the appellants and gone through the impugned judgment and the evidence on record.

It is not in dispute that consignor had despatched two consignments consisting of 900 bundles of matches

vide railway receipts No. A040205 and A40206 dated 26.2.1974 from Shivkasi for being delivered to the plaintiff No.1 at Jaipur. The consignment were loaded in wagon No. SE 32988, which caught fire resulting into damage to the above consignments.

The Indian Railways Act 1890 (IX of 1890) has undergone several changes from time to time. Under the Railways Act of 1890 (IX of 1980) the liability of the Railway was equated to that of bailees, instead of insurers. By the amendment in 1961 to the Act of 1890, the liability of the Railway has again been equated to that of an insurer, that is, of a common carrier. I am concerned in this case with the Railways Act of 1890 after the amendment in 1961. Section 73 of the Indian Railway Act, 1890 deals with general responsibility of a railway administration as a carrier of animals and goods. To decide the controversy, it would be profitable to quote the relevant portion of Sec. 73 of the Act:

> "Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery, in transit, of animals or goods delivered to the administration to be carried by railway, arising from any cause except the following, namely:-

(a) xx xx xx
to
(i) xx xx xx

Provided that even where such loss, destruction, damages, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the railway administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods."

The question is whether the defendants in this case have exonerated themselves by showing that they have taken due care and caution in the carriage of goods. In support of their case, the defendants have examined two drivers, one guard and one observer of the railways. DW1 B.M. Feral, driver has stated that the fire was extinguished within 1 – ½ hours. Neither there was sparking nor any flame of fire spread out from the engine. The wagon was absolutely in sound condition and was water tight. Neither there was hole nor any penal cut. He further stated that external sourse was not the cause of fire. In cross examination, the witness stated that the bundles were lying in containers and he was not in a position to state

whether condition of those containers was good or bad. According to him, there were 900 bundles. DW2 D.G. Shane, Guard of the train has stated that on the relevant day he had taken charge of the train at Khandwa station at 4.50 AM. Having taken charge, he had fully checked the complete compartments from both the sides. He has given similar statement as that of the statement of DW1 B.M. Feral. However, in cross examination, the Guard stated that 500 bundles of matches could have been easily placed in the wagon. Lastly, the witness stated that more quantity of bundles may result in to fire. DW3 Sudhakar, Observer has stated in his cross examination that in case the goods are loaded beyond the capacity of wagon, it may result in fire.

The defendants have neither examined the person who loaded the goods in the wagon in question nor have examined any member of the inquiry committee. However, report prepared by the committee of 3 members appointed for the purposes of finding out causes of fire has been produced on record. It speaks that there was a panel cut at the BB end panel. The wagon which was supplied was NWT and its floor was rusty. The Eng. Committee was

of the opinion that this defect of this wagon may contribute to the cause of the said wagon as wagon of good condition was not supplied

It is thus evident from the evidence discussed above that wagon in question was over loaded and therefore, possibility of fire by friction of bundles with each other cannot be ruled out. That apart, as per the report of the committee the floor of the wagon in question was rusty and it had a penal cut, therefore, the condition of wagon was not good so as to carry matches, explosive goods. For the reasons therefore, I am not prepared to hold that fire was only accidental. The defendant, in my view, cannot be said to have discharged its onus of proving that it has exercised all possible and reasonable care and caution. On the facts it has to be taken that the steps taken by the railways administration to secure the goods against loss or damages were inadequate.

The Commercial Inspector assessed the loss to the goods to the tune of Rs. 23,666/- vide Ex.5. PW2 I.S.Gill Surveyor appointed in the Insurance Company assessed the loss to the tune of Rs. 27,707.50 vide Ex.24. However, the Insurance Company paid Rs. 24066/-

on account of loss to the goods to plaintiff Kapil Dev. Therefore, the Insurance Company, plaintiff No.2 shall be entitled to recover Rs. 24066/- from the defendants with interest @ 6% p.a. From 9.7.1974when the Insurance Company paid the amount through cheque to the plaintiff No.1 till realisation of the amount.

For the reasons aforesaid, the judgment of the trial court is liable to be set aside.

In the result, this appeal succeeds and is hereby allowed. The impugned judgment and decree passed by the court below are set aside. The suit is decreed in favour of plaintiff No. 2 the New India Assurance Company Ltd. and against the defendants for a sum of Rs. 24,066/- with interest @ 6@ p.a. w.e.f. 9.7.1974, the date on which the Insurance Company paid the aforesaid amount through cheque to the plaintiff No.1, till realization of the aforesaid amount.

In the facts and circumstances of the case, the parties are left to bear their own costs.

(Khem Chand Sharma), J.

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